No. 89-2030

In The

Supreme Court Of The United States

OCTOBER TERM, 1989

COMMISSIONER OF REVENUE SERVICES OF THE STATE OF CONNECTICUT,
Petitioner,

v.

CALLY CURTIS COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Supreme Court of Connecticut err in holding that there was an insufficient nexus between Cally Curtis Company and the State of Connecticut to require Cally Curtis Company to collect the Connecticut use tax?

SUPREME COURT RULE 28.1 DISCLOSURE

There is no parent company, subsidiary or affiliate of Respondent Cally Curtis Company.

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STATEMENT OF THE CASE

The Petitioner, Commissioner of Revenue Services ("Commissioner") and Respondent, Cally Curtis Company ("Curtis") stipulated at trial to the following facts. These facts were also incorporated into the decision of the Connecticut Supreme Court (which affirmed the trial court's judgment in favor of Curtis).

1. During the three-year audit period, the total revenues of Curtis for sales, previews and rentals in Connecticut was $66,938.40. Of this amount, $45,722.80 was received for sales.

2. The total amount of use tax sought by the Commissioner for the three-year audit period was $5020.40.

3. Curtis made marketing contacts for Connecticut sales, previews and rentals only through (a) trade shows held in states other than Connecticut, at which catalogs were distributed to patrons, (b) mailing lists, and (c) referrals.

4. Curtis did not have any salesmen, personnel or independent representatives in Connecticut at any time.

5. Curtis did not have any offices, warehouses or inventory in Connecticut.

6. Curtis did not advertise by newspaper, radio or television in Connecticut.

7. A Connecticut customer wishing to order a film from Curtis completed a purchase or rental order and mailed it to Curtis at its California offices for acceptance in California.

8. All deliveries (and returns) of films to customers in Connecticut by sale or rental, were made by common carrier or the United States mail.

9. Curtis had no property in Connecticut other than the films rented or sold.

10. Curtis had no telephone in Connecticut and never visited its customers in Connecticut.

Stipulation of Facts, Appendix to Petition at ¶ 9-17, pages 21A-23A.

The trial court, after applying the tests of *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), and *Miller Brothers Co. v. Maryland*, 347 U.S. 340 (1954), held that Curtis lacked sufficient nexus with the State of Connecticut to require collection of the Connecticut use tax. The Connecticut Supreme Court agreed and affirmed.

REASONS FOR DENYING THE WRIT

1. There is no conflict between relevant U.S. Supreme Court decisions and the Connecticut Supreme Court decision in *Cally Curtis Company v. Commissioner of Revenue Services of the State of Connecticut.*

In *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), this Court held that a sufficient nexus must exist between an out-of-state seller and the taxing state for the taxing state to require the seller to collect use tax. That requirement was based on the Commerce Clause and the Fourteenth Amendment Due Process Clause of the United States Constitution. In determining whether sufficient nexus exists, the court is to examine the individual facts of each case. *See, e.g., L.L. Bean, Inc. v. Department of Revenue*, 101 Pa. Commw. 435, 516 A.2d 820 (1986). The requirement of sufficient nexus protects sellers from the onerous burden of collecting use tax for numerous states, municipalities and other taxing entities in which the seller's activities are not significant. The administrative burden would be overwhelming — especially for small sellers — and little or no benefit would be received in exchange by them from the taxing-entity. *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. at 756.

In determining whether sufficient nexus exists with the taxing state, this Court has considered the following:

1. employees or representatives working within the taxing state;

2. warehouses, inventory or other property within the taxing state;

3. retail outlets or stores within the taxing state; and

4. advertising by newspaper, radio or television within the taxing state.

See, e.g., National Bellas Hess, Inc. v. Department of Revenue, id., National Geographic Society v. California Equalization Board, 430 U.S. 551 (1977), *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960), *Miller Brothers Co. v. Maryland*, 347 U.S. 340 (1954); *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359 (1941). It is clear from these and other decisions of this Court that the court is to weigh these indicia of nexus and determine whether a "definite link, some minimum connection between a state and the person, property or transaction it seeks to tax" exists. *Miller Brothers Co. v. Maryland*, 347 U.S. at 344–45.

In his Petition, the Commissioner of Revenue Services for the State of Connecticut seeks to have this Court depart from its prior decisions which require a weighing of these indicia of nexus. Rather, the Commissioner argues that the presence of *any* property in the taxing state in and of itself constitutes sufficient nexus to satisfy the Due Process and Commerce Clauses. The reason given is ease of administration. The Commissioner maintains that prior U.S. Supreme Court decisions have held that the presence of any property satisfies the test.

This Court, however, in *National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 556 (1977), specifically rejected a "slightest presence test" for determining sufficient nexus. It held that indicia of nexus must be weighed and evaluated. The Commerce Clause and Due Process Clause require a thoughtful review of those indicia, not just a "checklist" approach to whether any property has ever been present in the taxing state. *Miller Brothers Co. v. Maryland, supra, National Bellas Hess, Inc. v. Department of Revenue, supra*, and their progeny have also stated that these indicia must be evaluated by the trial court. In these decisions, the test for sufficient nexus is not satisfied by the mere presence of property in the taxing state, without considering its significance.

The Connecticut Supreme Court in *Cally Curtis Company v. Commissioner of Revenue Services* performed a review of the indicia of nexus and concluded that the presence of rented films for brief periods did not constitute sufficient nexus, since all of Curtis' contacts with Connecticut were by U.S. mail or common carrier. No other facts identified by the U.S. Supreme Court as important in determining sufficient nexus were present. The Connecticut Supreme Court decision is consistent with *National Bellas Hess* and *National Geographic Society.* The Petitioner would have this Court depart from these decisions, not the Respondent.

Petitioner also cites *Union Oil Co. of California v. State Board of Equalization of California*, 60 Cal.2d 441, 34 Cal. Rptr. 872, 836 P.2d 496 (1963), *cert. denied*, 377 U.S. 404 (1964), and *In the Matter of Heftel Broadcasting, Inc.*, 57 Haw. 175, 554 P.2d 242 (1976), *cert. denied*, 429 U.S. 1073 (1977), as decisions which conflict with the Connecticut Supreme Court decision in *Cally Curtis Company v. Commissioner, supra.* Petitioner views those two decisions as support for a "slightest presence" test. In *Union Oil*, however, the property involved was two oil tankers. In *Heftel*, the property involved was rights under multi-year licensing agreements concerning television broadcasts. In both cases, the property involved was much more extensive than the films rented by Curtis. There also was no discussion of a "slightest presence" test; rather, the state courts applied the nexus tests of *National Bellas Hess* and *Miller Brothers*, just as the Connecticut courts in *Cally Curtis Company v. Commissioner.*

2. Curtis did not have sufficient nexus with the State of Connecticut.

The only evidence of nexus of Curtis with the State of Connecticut was the following: a portion of its revenues during the three-year audit period was the product of short-term rentals of its films to Connecticut entities.[1] No other indicia

[1] The total revenues from Connecticut during the three-year audit period were $66,938.40; $45,722.80 was attributed to sales and the balance to rentals and previews.

of nexus existed. For example, Cally Curtis had no employees in Connecticut, no retail outlets, no inventory, no Connecticut offices, no Connecticut advertising, no Connecticut telephone and made no visits to Connecticut. All orders, sales and rentals were made and filled through the U.S. mail or common carrier.

In *Miller Brothers Company v. State of Maryland,* 347 U.S. 340 (1954), this Court held that insufficient nexus existed for Maryland to require a Delaware furniture outlet to collect use tax where the outlet advertised extensively in Maryland and delivered furniture in Maryland in its own trucks. The trucking in the taxing state and the extensive advertising were held insufficient to meet the test of sufficient nexus.

The contacts between Curtis and the State of Connecticut were far less extensive than between the Delaware furniture outlet and Maryland in the *Miller Brothers* case. Accordingly, the Connecticut Supreme Court was correct in sustaining the trial court's judgment.

Petitioner seeks to challenge the Connecticut Supreme Court's reliance on *Miller Brothers* by suggesting that the use of Miller Brothers trucks in Maryland in delivering furniture was not "property" in Maryland for the purpose of the test for sufficient nexus. Rather, petitioner argues, those trucks were no different from U.S. mail trucks as "instruments of interstate commerce" and thus should be excluded from the test for sufficient nexus. The short answer is that this Court in *Miller Brothers* specifically considered the trucking activity in applying the test for sufficient nexus. There is no basis in the *Miller Brothers* opinion for concluding that such an exclusion from the test is appropriate. Moreover, extensive trucking or other private transportation of goods is an important factor to consider, especially given the extensive state governmental interest in the regulation of highways and safety.

3. The issue involved is not of "vital importance to all 45 States and the District of Columbia."

Petitioner argues that the issue involved is of "vital importance to all 45 States and the District of Columbia." Petitioner contends that a "slightest presence" approach would ease the administrative burden in deciding which out-of-state sellers are required to collect the use tax. Significantly increased use tax revenues would also result.

Curtis is much different from many mail order sellers, however. First, it had little revenues from Connecticut and the administrative burden on it for collecting use taxes for 45 States and the District of Columbia — as well as municipalities which have their own sales and use tax — would be overwhelming. Second, the narrow issue whether the presence of rental property constitutes sufficient nexus would not impact most large mail order firms which deal exclusively with sales of property. Thus, a decision on the merits would affect few entities.

CONCLUSION

Cally Curtis Company v. Commissioner of Revenue Services of the State of Connecticut is consistent with the relevant decisions of this Court. This Court has also specifically rejected the "slightest presence" test for evaluating the sufficiency of nexus of mail order firms.

Cally Curtis is of limited impact, only affecting small mail order firms which have revenues from mail order rentals.

It is respectfully requested that the petition be denied.

Respondent

Cally Curtis Company

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